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IN THE

Supreme Court of the United States

October Term, 1987

GENNARO LANGELLA,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not the Trial Court deprived Petitioner of due process of law in refusing to recuse itself because sufficient cause was shown to cause a reasonable man to have significant doubts as to whether the Trial Court could be impartial because it had previously investigated Petitioner when it was a State Prosecutor.

2. Whether or not the Trial Court violated Petitioner's due process right and also Title 28, United States Code, Sections 144 and 455 in not requiring another Judge to make the decision regarding the Trial Court's impartiality.

3. Whether or not impanelling an anonymous jury deprives a defendant, except in the case of great necessity, of his due process right and his right to trial by an impartial jury.

4. Other questions adopted in this Petition which are specifically set forth in the Petitions filed by the various Co-Petitioners in this case.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

This is a Petition by Petitioner, Gennaro Langella, from a judgment of the United States Court of Appeals for the Second Circuit, decided October 27, 1987, with a thirty-seven page opinion, which affirmed a judgment of the United States District Court for the Southern District of New York (Honorable John F. Keenan), rendered on November 13, 1986, convicting

Petitioner of the crimes of RICO, RICO Conspiracy and various substantive crimes, pursuant to 18 United States Code, Sections 1961, 1962 and other substantive statutes. Petitioner received sixty-five years in jail, consecutive to a ten year sentence he had already been serving.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1251. The Opinion of the United States Court of Appeals for the Second Circuit, reprinted at length in the Petition of Carmine Persico, as co-petitioner, No. 87-1323, is hereby incorporated.

STATUTES INVOLVED

18 U.S.C., Section 1961 Definitions

As used in this chapter --

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A)incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, of which is unforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B)which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

18 U.S.C., Section 1962 Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income or the proceeds of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the inten-

tion of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlaw debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

18 U.S.C., Section 201 Bribery of public officials and witnesses

(a) for the purpose of this section:

"public official" means Member of Congress,

the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official to give anything of value to any other person or entity, with intent --

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or

such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of value to any public official, former public official or person selected to be a public official, for or because of any official act performed or to be performed by such official, former public official, or person selected to be a public official.

FACTS

Petitioner, Gennaro Langella, adopts the Facts set forth in the Petitions of Carmine Persico, Docket No. 87-1323, and the Petition of Alphonse Persico, John DeRoss and Anthony Scarpati, Docket No. 87-1324.

Petitioner, Gennaro Langella, was named in many of the counts in this indictment, and the government's theory was that he ran the day to day operations of the Colombo Family while Carmine Persico was in jail. Consequently, it was the government's theory that Mr. Langella was involved in the construction industry aspect of the case, in that monies had been extorted from contractors in the cement industry which was involved in the construction of buildings in New York. Mr. Langella was also convicted of bribery in connection with so-called favored treatment for Carmine Persico while he was in jail, extortion and extortionate extension of credit with regard to loans, prevalently pleaded throughout the entire indictment.

Approximately fifteen days before the trial in this case actually began, Mr. Langella filed a written motion requesting the Court recuse itself, essentially on the basis that the Court, while it had been a

New York State Special Prosecutor, had investigated the Colombo Family, of which the Petitioner was allegedly a member, in connection with the killing of one of its claimed members.

In that motion Petitioner's counsel argued that one of the issues that was to be litigated in the within action was whether or not Langella was a member of the Colombo Organized Crime Family, since that was the enterprise specifically pleaded in the indictment. When Judge Keenan had been a Special Prosecutor, his office and people under his direct supervision had undertaken to investigate an alleged gangland slaying of one, Joey Gallo, which had occurred on April 7, 1972, and the Judge while a prosecutor had personally debriefed on alleged organized crime figure, one, Joseph Luparelli, who told him that the "Colombo Family" was responsible for the killing of Joey Gallo as revenge for the fact that

they believed he had ordered the attempted murder of their former leader, Joseph Colombo. Luparelli, in his debriefing by Judge Keenan and his staff, allegedly specifically mentioned Gennaro Langella's name and his role in the alleged Colombo Family organization.

The Court not only refused to recuse itself but refused to allow the decision to be made by another Court, in clear violation of Section 144 of Title 28, United States Code, and it proceeded to make the decision itself based upon matters which were within the Court's own knowledge based upon the Court's own private investigation and which were clearly beyond the record.

POINT I

SUFFICIENT FACTS WERE RAISED BELOW TO REQUIRE THE TRIAL COURT TO RECUSE ITSELF. CERTAINLY, THE COURT HAD NO RIGHT TO MAKE THAT DECISION WITHOUT A HEARING AND WITHOUT REFERRING THE MATTER TO ANOTHER JUDGE.

When defense counsel first advised the Judge that Petitioner would be making such a motion, the Judge angrily dismissed it out of hand, characterizing it as a "phony motion":

> "I consider that a phony motion... I consider that a phony motion ... what burns me up about this sort of thing is this ... pull something from one's sleeve or a rabbit from the hat that I am to be disqualified because of the Gallo investigation ... I can tell you you are going to be wasting your time."

Transcript of September 26, 1985 at 10.

When Petitioner thereafter filed a written motion for recusal, the Trial Judge denied it (A241, et seq.)* without a hearing but rather, the Judge found, based on personal knowledge and unspecified "old records" that the principal allegations in

*"A" References are to Pages of the Appendix in the United States Court of Appeals for the Second Circuit.

Petitioner's affidavit were not correct. Consequently, the Judge concluded that the affidavit was insufficient. He also held that the motion was untimely, despite the fact that it was filed several weeks before any trial proceedings were scheduled to commence.

The Trial Judge's findings, as well as the procedure he employed to dispose of Petitioner's motion, were clearly incorrect. Under the applicable statutes, the motion was both timely and sufficient. Consequently, Petitioner was entitled to have Judge Keenan either recuse himself or, at a minimum, refer the motion to another Judge for a decision on the merits. The Judge's decision to instead dispose of the matter summarily based on information outside the record violated not only the controlling federal statutes but also the concept of fair and impartial justice embodied in the Due Process clause of the Federal Constitution.

The Court of Appeals, in its opinion, did not comment on Petitioner's claim except for a passing reference to the anonymous jury claim.

This Court has made clear that the Constitution guarantees a tribunal which is not only free from actual bias but also free from even the appearance of bias:

> "But to perform its high function in the best way 'justice must satisfy the appearance of justice'."

In re Murchison, 340 U.S. 133, 136 (1955), quoting Offutt v. United States, 348 U.S. 11, 14 (1954).

More recently, the Court restated this principle thus:

> "...any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968).

See also Public Utilities Commission v. Pollak, 343 U.S. 451, 466,467 (Frankfurter, J.); Whitaker v. McLean, 118 F.2d 596 (D. C. Cir. 1941); Bradshaw v. McCotter, 785

F.2d 1327, 1329 (5th Cir. 1986); Rapp v. Van Dusen, 350 F.2d 806, 812 (3d Cir. 1965). In the context of this fundamental constitutional right, the "appearance of impartiality is virtually as important as the fact of impartiality." Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977). Consequently, if a Judge's presence in the trial of a case does not comport with the appearance of justice, the proceedings are improper and any resulting conviction must be reversed. Berger v. United States, 255 U.S. 22 (1921).

Sections 144 and 455 of Title 28 embody this constitutional protection and provide the procedures deemed most suitable by Congress for its implementation. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall

proceed no further therein, but another judge shall be assigned to hear such proceeding.
The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 455 provides in relevant part:

"(a) any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) Where in private practice he served as a lawyer in the matter in controversy, or al lawyer with whom he previously practiced law serving during such association as a lawyer concerning it;
(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion con-

> cerning the merits of the particular case in controversy:
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy, or any other interest that could be substantially affected by the outcome of the proceeding ..."

The "appearance of justice" standard has also been found to be implicit in section 144 by virtue of the holdings relating to the Due Process clause. Consequently, the courts have concluded that the test to be applied under both of these sections is "identical" -- whether a reasonable man apprised of the grounds on which recusal was sought might entertain a significant doubt as to the judge's impartiality in that particular case. Berger v. United States, supra, 255 U.S. at 35-36; Pepsico, Inc. v. McMillen, 764 F.2d 458, 460-61 (7th Cir 1985); United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980).

Although the test under both statutes is the same, the procedures they establish are markedly different and to some extent complimentary of one another. United States v. Sibla, supra. Section 455 is directed to the Judge and is self-enforcing on the part of the Judge. United States v. Sibla, supra; Davis v. Board of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). If a Judge in a case is aware of any grounds for disqualification under Section 455, he has a duty to recuse himself under that provision. United States v. Sibla, supra; Nicodemus v. Chrysler Corp., 596 F.2d 152, 157 & n. 10 (6th Cir. 1979).

Even if a Trial Judge does not believe any grounds for recusal exist, however, he is required, upon the filing of a sufficient application by a party under Section 144, to transfer the matter to a

different Judge, at least for a determination of the merits of that motion. See eg. United States v. Sibla, supra. Consequently, although the presiding Judge must thus make an initial determination as to the legal sufficiency of the application, he is not authorized or permitted to make any determination as to the truth of the matters alleged therein. As this Court explained in a seminal case of Berger v. United States, 255 U.S. 22, 35-36 (1921), this procedure was specifically adlopted by Congress in order to eliminate any appearance of partiality from federal judicial proceedings. According to the Court, Congress intended:

> "...that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its

> explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed 'shall proceed no further therein, but another judge shall be designated ...to hear such matter.' And the reason is easy to devine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed."

In the present case, Petitioner's affidavit was more than sufficient to establish a prima facie case for disqualification. Since the allegations in that affidavit were such that the "Judge's impartiality might reasonably be questioned," United States v. Bennett, 539 F.2d 34, 51 & n.5 (10th Cir. 1976); United States v. Gigax, 605 F.2d 507, 511 (10th Cir. 1979), the Trial Judge was required for that reason alone to recuse himself under 28 U.S.C. 455.

Even if the Judge felt that the allegations in the affidavit were false or inaccurate, however, he was still obliged, under section 144, to recuse himself in

order to allow another Judge, one who was not himself the subject of the motion, to determine its merits.

Instead of doing so, the Judge in this case proceeded to make his own determination as to the truth of falsity of the allegations in Petitioner's motion. Moreover, he did so on the basis of information which was not part of the record and which was never subject to testimony under oath or to cross-examination. This summary disposition of the merits of the application, as well as the Court's finding of untimeliness, were clearly erroneous.

In his application, Petitioner Langella alleged that Judge Keenan:

a. Has a personal prejudice against me;
b. Has personal knowledge of disputed evidentiary facts concerning the proceedings;
c. Has served in governmental employment and expressed an opinion about material facts going to the merits of this case; and

d. Is in a position where his impartiality might reasonably be questioned.

(A 234-235)

Petitioner then went on to state that the basis for these beliefs was the actions taken by Judge Keenan and persons under his supervision concerning the Petitioner while Judge Keenan was the chief of the Homicide Bureau of the New York County District Attorney's office. Specifically, Petitioner alleged the following:

6. From in or around 1956 to in and around 1976, Judge Keenan was an Assistant District Attorney of New York County.
7. At various times, Judge Keenan was Chief of the Homicide Bureau and Chief Assistant District Attorney.
8. In the early 1970's, Judge Keenan was involved in the investigation of "organized crime"-related homicides.
9. One such homicide was the murder of Joey Gallo at Umberto's Clam House on April 7, 1972.
10. Judge Keenan was in charge of the investigation of the Gallo murder
11. On April 8, 1972, one Joseph Luparelli walked into FBI headquarters in Santa Ana, California and announced that he was part of the group that "hit" Joey Gallo.

12. Luparelli was flown back to New York to become an informant for the New York City Police Department and the New York County District Attorney's Office.
13. Judge Keenan directed and participated in the debriefings of Luparelli.
14. The following matters of information, among many others, were told by Luparelli to Judge Keenan and other law enforcement figures:
(a) Luparelli stated that he was the chauffeur-bodyguard to Joseph Yacovelli, who, he claimed, was consigliere and (since the shooting of Joseph Colombo on June 28, 1971) de facto "Boss" of the "Colombo crime family";
(b) Luparelli, a/k/a "Joe Fish", stated that the "Colombo family" believed Joey Gallo was responsible for the attempted murder of Joseph Colombo in late June, 1971;
(c) Luparelli told Judge Keenan and others that claimed leaders of the "Colombo family" met for the purpose of deciding what to do about Gallo;
(e) Luparelli told Judge Keenan and others that I met, in Ulster County, New York, with claimed leaders of the "Colombo family" on Tuesday, April 4, 1972;
(f) Luparelli told Judge Keenan and others that on April 5, 1972, I flew to Atlanta, Georgia to meet with a claimed leader of the "Colombo family";
(g) In the pre-dawn hours of Friday, April 7, 1972, Luparelli and four other claimed members of the "Colombo family" murdered Joey

Gallo, according to Luparelli's statements to Judge Keenan and others;

(h) Luparelli told Judge Keenan and others that after he murdered Gallo, he and the others went to hide-out in the three bedroom apartment of Joe Yacovelli at 101 Gedney Street in Nyack, New York.

(i) Luparelli told Judge Keenan and others that claimed "captains" of the "Colombo family" were called to the Nyack apartment in the days following the Gallo shooting and that I was one of the first to go to the apartment.

(j) Luparelli told Judge Keenan and others that he fled the Nyack apartment after several days of hiding-out because he feared for his life, and on April 18th he surrendered to the FBI.

15. Judge Keenan expressed the opinion at the time that he believed Luparelli.

16. Judge Keenan further expressed the opinion that I was a member of the "Colombo organized crime family".

17. Judge Keenan attempted to gather evidence to prove my association with the "Colombo organized crime family".

18. As a result of Judge Keenan's investigation I was subpoenaed to appear before a New York County grand jury.

19. I appeared on December 19, 1972 and was asked, among other questions, "whether [I] visited 101 Gedney Street in Nyack, New York during the month of April, 1972, and, whether inside the apartment LK...[I] also spoke with Joseph Luparelli.

20. Upon my refusal to answer those questions, Judge Keenan and the New York County District Attorney's Office obtained an indictment charging me with criminal contempt.
21. As a result of the indictment and subsequent conviction, I was sentenced to five months in prison on July 24, 1975.
22. Since the central issue of this case is whether or not I am a member of the "Colombo Organized Crime Family", and since Judge Keenan has already, as a state prosecutor, investigated that issue, concluded that I am, and expressed such an opinion to others, I believe that he should and must recuse himself, or be disqualified, with respect to my case.

It should be noted that Judge Keenan, in his decision denying Petitioner's recusal motion, confirmed that he had been "in charge of the Homicide Bureau in the New York District Attorney's Office" at the time of the Gallo murder and the ensuing investigation (A 245), that said homicide had therefore been under his jurisdiction (Id.), and that he himself had personally taken part in various aspects of the investigation (Id.). However, he denied

several of Petitioner's other factual allegations, as well as Petitioner's request that he be recused.

The allegations in Petitioner's application were more than sufficient under what has been characterized as the "broad and liberal purposes sought to be achieved" by the judicial disqualification provisions. SCA Services Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977). Petitioner's allegations clearly were based entirely on events which took place before the Judge in question took the Bench.

Moreover, the allegations were clearly of sufficient specificity to satisfy the requirements of 28 U.S.C. 144. Petitioner did not rely on mere "rumors or gossip". Berger v. United States, supra. Rather, he cited specific circumstances, events and frequently even dates for the factual bases of his application.

Judge Keenan faulted the application on the ground that Petitioner had failed to cite a source for one of his allegations (A 246). In doing so, the Judge disregarded the fact that Petitioner did cite sources (i.e. personal knowledge) as well as dates and locales for most of his allegations. Moreover, as this Court noted in Berger v. United States, supra, 255 U.S. at 34-35, the statute specifically authorizes such applications to be based on belief:

> "It is, however, said, that the assertion and the facts are stated on information and belief and that hence the affidavit is wholly insufficient, section 21 requiring facts to be stated 'and not merely belief'...The belief of a party the section makes of concern and if opinion be nearer to or farther from persuasion than belief, both are of influence and universally regarded as of influence in the affairs of men and determinative of their conduct, and it is not strange that section 21 should so regard them...We are of the opinion, therefore, that an affidavit upon information and belief

> satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case."

The indictment in this case alleged that between 1968 and the filing of the indictment, Petitioner Langella had participated in a racketeering conspiracy oriented around the Colombo organized crime family. Petitioner's affidavit alleged, and Judge Keenan conceded in part, that during this period, the Judge, as a State prosecutor, or others working with him and under his supervision, investigated and prosecuted Petitioner in connection with such alleged activities. As such, the circumstances in in this case would seem to come within the specific provision of 28 U.S.C. 445(b)(2) that a judge shall disqualify himself "where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced

law served during such association as a lawyer concerning the matter...". The judge's disqualification would also be required under 455(b)(3) in that he had "served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." In re Rodgers, 537 F.2d 1196, 1198 (4th Cir. 1976); Bradshaw v. McCotter, supra.

At the very least, Petitioner's affidavit was sufficient to establish a prima facie case for Judge Keenan's recusal on the ground that his continued participation in the case created the appearance of judicial partiality. In this regard, Judge Keenan's discussion about whether he had personally participated in the investigation and prosecution of Petitioner Langella, or whether it had been done by someone under

his supervision (A 245-246) is, in addition to being an improper analysis of the merits of Petitioner's application (see section B, infra), also irrelevant. Rather, Judge Keenan's concession that he had supervised the office which engaged in such activities (A 245) was itself sufficient to require his recusal in this case, or least a hearing.

In the present case, both Petitioner and the public had valid reason to believe that Petitioner's trial was being presided over by a judge who had previously played a part in investigating and prosecuting him. Since this circumstance created at least the appearance of partiality, Petitioner's application was clearly sufficient.

Also, the Trial Judge erred in passing judgment on the truthfulness of the factual allegations in Petitioner's application.

As previously explained, upon the filing of a facially sufficient affidavit, section 144 forbids the judge in question from rendering any decision as to the truth of its contents:

> "...the section withdraws from the presiding judge a decision upon the truth of the matters alleged."

Berger v. United States, supra, 255 U.S. at 36.

As the Circuit Court explained in Hodgson v. Liquor Salesmen's U. Loc. No. 2 of State of N.Y., 444 F.2d 1344, 1348 (2nd Cir. 1971), this prohibition applies even if the presiding judge personally believes that the allegations in the application are incorrect:

> "Since the purpose of the section is to avoid the appearance as well as the actual existence of bias or prejudice on the part of the trial judge, the facts stated in the affidavit as the basis for the belief that bias or prejudice exists must be accepted as true by the judge even though he or she knows the statements to be false."

Here, however, the presiding judge completely disregarded this admonition. To the contrary, he specifically rejected numerous of Petitioner's allegations as untruthful (A 245-246). Moreover, he did so based on his own recollections and his personal examination of unspecified "old records", neither of which were available for inspection or cross-examination by Petitioner:

> "At the time of the [Gallo] murder, April 7, 1972, I was in charge of the Homicide Bureau in the New York County District Attorney's Office. As such, any Manhattan homicides were under my jurisdiction. Later that month, one Joseph Luparelli surrendered to the authorities in California and stated that he had driven one of two automobiles used by the killers of Gallo. He was questioned by me and high ranking New York City police officers on April 20, 1972. On various other occasions, I participated in interviews of Luparelli. I have absolutely no recollection of his ever having mentioned Gennaro Langella in any of those interviews. As stated by the Court at the September 26, 1985 conference: 'None

> of the defendants in this case were even questioned by me nor were any of them prosecuted by me'. (Transcript at 12)
>
> The actual Grand Jury presentations relating to the matter were not conducted by me, but an Assistant to whom the case was assigned. The first that this Court realized that Mr. Langella was indicted for contempt relating to the Gallo investigation was upon receipt of the motion papers herein on September 30, 1985...After receiving the motions on September 30, 1985, the Court has caused a check to be made of old records. These confirm that I did not appear in the Grand Jury in connection with the Langella contempt matter nor did I participate in the trial of the matter in any way." (A 245-246).

Having thus contested the truth of numerous of Petitioner's allegations, the judge then went on to hold that the remaining allegations were insufficient (A 246-247).

This approach was totally improper. By making himself in effect an unsworn witness, from from cross-examination, and at the same time the supposedly neutral tribunal passing on the merits of the application , the judge was instilling the very

appearance of partiality which the procedures set forth in 144 were designed to eliminate. The court's failure to refer Petitioner's application to another judge for adjudication on the merits tainted the remainder of the proceedings before it, with the result that the ensuing conviction must be reversed.

Ir the present case, Judge Keenan's prior prosecutorial activities relating to Petitioner Langella created the very real danger that he would harbor a bias against that defendant which would affect his judgment in the many decisions to be made at the trial of this case. At the very least, it created in both the Petitioner's and the public's eye an appearance of partiality that cast a cloud over the proceedings. Given these circumstances, the trial judge was obliged to recuse himself. At the very least, he was obliged

to transfer the motion to another judge for a decision on its merits. Having failed to do either, the trial judge's continued presence tainted the trial and requires that Petitioner's conviction be set aside so that he can be retried before a tribunal which comports with constitutional and statutory requirements.

POINT II

THE DISTRICT COURT'S IMPANNELING OF AN ANONYMOUS JURY AND THE OTHER STEPS IT TOOK REGARDING THE JURY DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TRIAL BY AN IMPARTIAL JURY.

At the request of the government and ovet objection from the defense, the District Court, prior to trial in this case, entered an order "(1) limiting voir dire examination of prospective jurors so that no vinerman's name, address, or place of employment is disclosed; (2) at trial, keeping the jurors together during recesses and having the United State Marshal's Serive take them to lunch as a group; and (3) at the end of each trial day, having the United States Marshal's Service transport the jurors as a group to an undisclosed central location, from which they can depart for their respective communities" (A 249).

Although the Second Circuit has permitted anonymous juries under certain limited

circumstances in the past, recent decisions by this Court have cast doubt on the continued validity of those holdings. Moreover, the circumstances of this case do not compel such extreme and highly prejudicial action. Since the impanelling of an anonymous jury and the other actions which the District Court ordered regarding the jury violated Petitioner's fundamental constitutional rights, his conviction must be reversed.

Secrecy in judicial proceedings has always been anathema to this country's system of criminal justice. See eg. Matter of Oliver, 333 U.S. 257, 268-270 (1948). The impanelling of an anonymous jury is one of the most dangerous manifestations of such secrecy, in that it violates two specific constitutional guarantees - the right to trial by an impartial jury protected by the Sixth Amendment and the presumption of innocence embodied in the due process clause of

the Fifth Amendment.

A. The Sixth Amendment violation

The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...", a right which is also guaranteed by the due process clause of the Fifth and Fourteenth Amendments. Ristaino v. Ross, 424 U.S. 589, 595 n. 6 (1976); Irving v. Dowd, 366 U.S. 717, 722 (1962). In United States v. Barnes, 604 F. 2d 121, 133 (2d Cir. 1979), it was held that under certain limited circumstances, this constitutional protection was not violated by restrictions imposed by a District Court on voir dire which prevented the defense from learning the prospective juror's identities, residence locale or ethnic backgrounds.

This Court has never specifically addressed the issue of the constitutionality of impanelling an anonymous jury. However,

several decisions by this Court since the Barnes decision have raised serious doubts as to the continued validity of the majority's opinion in that case. First in Rosales-Lopez v. United States, 451 U.S. 182 (1981), this Court acknowledged the constitutional significance of restrictions imposed on a jury voire dire:

> "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the Trial Judge's responsibility to remove prospective jurors who will not be able impartially to follow the Court's instructions and evaluate cannot be fulfilled. See Connors v. United States, 158 U.S. 408, 413 (1895). Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in federal courts."
>
> Id., 451 U.S. at 188.

Subsequently, the Court vacated a death sentence because the jury voir dire had been inadequate. Justice Brennan, concurring in part and dissenting in part, explained that

the Sixth Amendment guarantee of an impartial jury

> "...is not mere exhortation for it has been noted that 'the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial.' Ham v. South Carolina, 409 U.S. 524, 532 (1973) (Marshall, J. concurring in part and dissenting in part). Among the most important of the means designed to insure an impartial jury is the right to strike those juros who manifest an inability to try the case solely on the basis of the evidence. This right to exclude incompetent jurors cannot be exercised meaningfully or effectively unless counsel has sufficient information with which to evaluate members of the venire."

Petitioner subjits that in light of this Court's decisions, the majority's holding in Barnes, and the scope of that holding, should be re=examined. The peremptory challenge is "one of the most important of the rights secured to the accused", Pointer v. United States, 151 U.S. 396, 408 (1894). As this Court explained one century ago:

> "Experience has shown that one of the most effective means to free the jury-box from [jurors] unfit to be there is the exercise of the peremp-

> tory challenge. The [party] may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted."

Hayes v. Missouri, 120 U.S. 68, 70 (1887).

Consequently, the "denial or the impairment of this right is reversible error without a showing of prejudice". Swain v. Alabama, 370 U.S. 202, 219 (1965).

This Court's recent holdings on the peremptory challenge issue crystalize its earlier decisions to the effect that "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned ...[a defendant] cannot be compelled to make a peremptory challenge until ...an opportunity [has been given] for such inspection and examination of [each proposed juror] as is required for the due administration of justice." Pointer v. United States, supra, 151 U.S. at 408-409.

Since a peremptory challenge may be "exercised on grounds normally thought irrelevant to legal proceedings" Swain v. Alabama, supra, 380 U.S. at 220, the defendant must be afforded sufficient inquiry into the jurors' identities, backgrounds and attitudes to enable them to make an intelligent exercise of their peremptory challenges. United States v. Harris, 542 F.2d 1283 (7th Cir. 1976); United States v. Dellinger, 472 F.2d 340, 367-70 (7th Cir. 1972); United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972). Names and addresses are also essential because parties are entitled, if they so desire, to conduct an independent investigation of the jurors. See eg. United States v. Falange, 426 F.2d 930 (2d Cir.), cert. denied, 400 U.S. 906 (1970); United States v. Costello, 255 F. 2d 876 (2d. Cir.), cert. denied, 357 U.S. 937 (1958). By depriving Petitioner of this basic information, the District Court pre-

vented him and his co-appellants from making a meaningful exercise of their peremptory challenges, thereby depriving them of the procedure necessary to insure their constitutional right to a fair and impartial jury.

B. The Fifth Amendment violation

The impanelling of an anonymous jury also violated Petitioner's right under the due process clause of the Fifth Amendment to the presumption of innocence. In United States v. Thomas, 75 F.2d 1359, 1364 (2d. Cir. 1985),the Second Circuit acknowledged that "the presumption of innocence is of significant importance, and is protected by the due process clause of the Fifth Amendment." The Court also recognized that a judge's instructions to a juror not to reveal his name probably affects the jurors' opinion of a defendant, and thereby implicates Fifth Amendment due process (id.). Consequently, "the impanelling of an anony-

mous jury - and its impact on the presumption of innocence must therefore receive clost judicial scrutiny and be evaluated in the light of reason, principle and common sense" (Id. at 1363). According to the Court in that case, such a practice is constitutional only if there is "first, strong reason to believe that the jury needs protection and second, reasonable precaution must be taken to minimize the effect that such a decision might have on the jurors' opinion of the defendants" (Id. at 1365).

The Government failed to establish the compelling circumstances necessary to justify the practices employed here.

The District Court held that an anonymous jury was necessary in this case premarily because of the "seriousness of the offenses charged" 9A 252-53). It is therefore significant that although the government interjected numerous general allega-

tions of dangerousness into the indictment, no specific act of violence was identified anywhere in that document. Moreover, the Judge failed to conduct any hearing to determine whether the government's allegations were valid and sufficient enough to justify the aura of dangerousness and secrecy it was seeking to impose on these proceedings.

The government's second ground for seeking an anonymous jury - that defendants might seek to interfere with them if their names and addresses were known - was likewise totally unsubstantiated. It was based solely on the allegation in the indictment that some of the defendants had sought to bribe officials of the Internal Revenue Service and the Federal Bureau of Prisons (A 254). In relying on this justification, the District Court ignored the fact that several of the defendants had previously been in trials without anonymous juries and without any evidence whatsoever of jury tampering.

The third justification given by the government - publicity - is particularly unfair since it was the government's own press conferences, press releases and news articles which generated much of the publicity surrounding the proceedings in this case. For the government to instigage such publicity and then seek, over Petitioner's opposition, to use it to justify restrictions on the jury voir dire is clearly improper.

The District Court's decision to impanel an anonymous jury was highly prejudicial to the defendants in this case. Although the reason for that decision must have been transparently clear to the jurors so selected, any doubts in their minds were laid to rest by the media. On September 27, 1985, shortly before the commencement of trial in this case, the New York Daily News ran an article titled, "Mob Panels to Get Cover", which stated:

> "Fearing mob attempts to 'bribe, threaten or injure' jurors, Manhattan federal court officials will take extraordinary security precautions next week when juries are picked for two major organized crime trials."

The article went on to state that:

> "In Court affidavits submitted by Guiliani's staff, the federal prosecutors maintained they had 'substantial evidence' that efforts might be made to intimidate jurors in the cases."

Next, on September 30th, the New York Post ran a front page headline which read, "NO-NAME JURIES AS MOB BIGS GO ON TRIAL TODAY", with an article explaining that anonymity had been ordered in a related trial because of an informant's "prediction that the defendants will try to 'reach' the jurors" and that the Judge had indicated that bribe attempts and threats against the jury are normal in a case like this. Likewise, on September 30th, WINS radio reported in its newscasts that anonymity was being used to protect the jurors

from bribery and other interference.

On October 1st, the New York Times reported that government attorneys had made clear that anonymity was necessary to protect jurors from jury tampering by the defendants. That same day, the New York Daily News headlined an article with the caption,"MOB TRIALS TRIGGER FEARS OF JURY DUTY." The following day, the New York Post ran a cartoon satirizing the fact that trial judges who order anonymity attempt unsuccessfully to mislead the jurors into believing that it is being done only to protect them from reporters.**

It is therefore clear that the actions taken by the District Court with regard to the jury in this case did substantially interfere with Petitioner's due process right to the protection of the presumption of innocence. Moreover, by refusing to allow

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**The news articles referred to above are set forth in Item 72 of the record on appeal.

the jurors to disclose their names and addresses, the Court prevented the Petitioner from making an intelligent exercise of his peremptory challenges. Particularly in light of the recent decisions of this Court emphasizing the importance of an adequate voir dire and the absence of any adequate justification for the restrictions imposed in this case, those restrictions were unconstitutional and require that Petitioner's convictions be set aside.

POINT III

PETITIONER, GENNARO LANGELLA, JOINS IN AND ADOPTS THE POINTS SET FORTH IN THE PETITIONS OF CARMINE PERSICO, ALPHONSE PERSICO AND OTHER PETITIONERS.

Petitioner points out that certain arguments have been made in the petitions of co-petitioners, especially with relation to the propriety of the Trial Court receiving testimony on behalf of one, Frederick DeChristopher. Because Petitioner does not want to impose additional burdens upon this Court, Petitioner does not set forth at length all of the arguments contained in those petitions, but has intended to focus on those issues arising to a great degree in this petition rather than that of the other Petitioners. Petitioner wishes this Court to recognize the fact that he does not minimize the importance of those other issues. For example, DeChristopher's testimony that while Carmine Persico was hiding out at the DeChristopher house, Persico

told DeChristopher that Petitioner Langella was in essence running the Family for him, and the Trial Court received testimony in such hearsay fashion which clearly implicated Langella which came out of the mouth of DeChristopher testifying to things he supposedly heard from Persico. Thus, the constitutional basis and propriety of receiving that type of evidence is as important for Langella as it is for the other Petitioners. The other issues raised, such as the undue publicity, sequestration of the jury and other matters are equally applicable to Petitioner Langella.

CONCLUSION

THE PETITION FOR CERTIORARI
SHOULD BE GRANTED.

Respectfully submitted,

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